1976

State of Utah v. George Oliver Dumas : Brief of Appellant

Utah Supreme Court

James N. Barber; Meredith, Barber and Day; Attorney for Appellant.
Attorney General of Utah; Attorneys for Respondent.

IN THE

SUPREME COURT OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

GEORGE OLIVER DUMAS,

Defendant-Appellant.

Case No. 14176

BRIEF OF APPELLANT

* *

Appeal from the Judgment and Sentence of the Third Judicial District Court of Salt Lake County - Utah
The Honorable Bryant H. Croft, District Judge

JAMES N. BARBER
MEREDITH, BARBER & DAY
455 South Third East, Suite 101
Salt Lake City, Utah 84111
Attorneys for Defendant-Appellant

ATTORNEY GENERAL OF UTAH
State Capital Building
Salt Lake City, Utah 84114
Attorneys for Plaintiff-Respondent

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases continued — Page(s)

Statutes Cited

Secondary Authorities Cited

IN THE

SUPREME COURT OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- GEORGE OLIVER DUMAS, Defendant-Appellant.	Case No. 14176

BRIEF OF APPELLANT

* * *

STATEMENT OF THE CASE

This case was a criminal action brought by the State of Utah against defendant-appellant George Oliver Dumas charging him with aggravated robbery, a felony in the First Degree, in violation of 76-6-302, Utah Code Annot. 1953, as amended.

DISPOSITION IN LOWER COURT

In the District Court of the Third Judicial District, Salt Lake County, Utah, on June 12th, 1975 the jury found the appellant guilty of attempted aggravated robbery, a lesser included offense to the offense charged. Subsequently, appellant was sentenced to the Utah State Prison for a term of one to fifteen years as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this Court reversing his conviction and quashing the Information filed herein, or in the alternative, remanding the case to the Third Judicial District Court for a new trial consistent with the rulings of this Court.

STATEMENT OF THE FACTS

The Information charged appellant George Oliver Dumas with having robbed Robert Allen Haynes and Richard DeLucia by the use of a deadly weapon, to-wit: a firearm on or about February 19, 1975 in Salt Lake County, Utah. In support of its charge the State introduced the following witnesses and evidence.

Claude Aaron Parks testified that he was released from Leavenworth Penitentiary on February 18, 1975 and that he boarded a bus bound for Washington (T.16)*. While on the bus he met the victims of the alleged robbery Robert Haynes and Richard DeLucia (T.16). During the course of their journey they produced some quantities of illegal drugs (T.17). After having partaken of a modest quantity of these drugs, the trio arrived at Salt Lake City sometime on the evening of February 19th. Parks testified that when he reached Salt Lake he phoned Gail Boone, with whom he had served time at the Utah State Prison

---

* Hereinafter "T" designations shall refer to the Transcript of Trial Proceedings.

(T.18), and arranged to meet Boone at the Salt Palace in Salt Lake City (T.19). Subsequently, Boone arrived and a meeting occured in the parking lot of the Salt Palace at which Parks told Boone of the narcotics in the hands of Haynes and DeLucia, (T.21), trading the information for a change of clothes and a plane ticket to Washington. Subsequently a second meeting was held in the parking lot of the Salt Palace between Parks, Boone, and defendant-appellant Dumas (T.23). At this meeting no reference was made to plans to rob Haynes and DeLucia (T.24-26). Thereafter Parks proceeded back to the Greyhound Bus Terminal. A meeting of several individuals including Gail Boone, George Dumas, Richard Ronald Nielson, and two other individuals, together with Claude Parks occurred in the restroom of the bus depot during which reference to Haynes' and DeLucia's possession of narcotics was made (T.28). Parks indicated that he would try to get Haynes and DeLucia outside on the street (T.30) and he "thinks" Dumas indicated that he and some others would "get into position" (T.31). Subsequently, Parks did entice Haynes and DeLucia to the street. When they got outside, Nielson was seven or eight feet from their position and Dumas was some fifteen feet up the street (T.33). After trying to talk Haynes and DeLucia out of the drugs, Parks motioned to Nielson who accosted Haynes and DeLucia and pulled a rifle from under his coat (T.36). Dumas apparently remained standing in the same position. He testified that Nielson hit DeLucia on the head

with the stock of a sawed-off rifle (T.38) and that he (Parks) got into a struggle over the weapon which developed between Nielson and DeLucia (T.38). Parks apparently succeeded in getting the gun away whereupon he ran, with the gun, to the Salt Palace (T.39). Parks also testified that a red Pantera automobile (which subsequently proven to belong to defendant Dumas) was parked nearby, adjacent to the sidewalk (T.40). He testified that he later met Boone at the Salt Palace and they disposed of the gun in a trash can (T.41-43). Parks testified that he was subsequently accosted by some policemen and arrested (T.44-46).

Jeff McCullin, a bus passenger, testified to having seen the red Pantera parked in front of the bus depot. He did not see the individuals park or alight from the car (Vol.II T.16). He also saw four "muscular" individuals none of whom he could identify, walk into the bus station (Vol.II T.18). He went outside and saw one person running to the right and another running toward the Salt Palace. He could not identify these individuals (Vol.II T.17).

Teddy Klassen testified to being at the bus depot in the company of Mr. McCullin and a girl (Vol.II T.19). He corroborated the presence of the red Pantera in front of the bus depot and stated that he walked outside after it arrived (T.20). He also saw three muscular individuals apparently in the vicinity of the bus depot (Vol.II T.21). He saw a heavy

set individual running toward the Salt Palace with a long object in his hand (Vol.II T.22). Thereafter several policemen arrived (Vol.II T.22).

The State then called Robert Allen Haynes, one of the purported victims (Vol.II T.25) who indicated that he made a bus trip to Salt Lake City carrying a suitcase (Exhibit 3) containing some drugs including marijuana, cocaine, and quailude (Vol.II T.27-28). He acknowledged having become acquainted with Mr. Parks on the bus (Vol.II T.28),and giving him a small quantity of drugs (Vol.II T.29). He also stated that when he arrived in Salt Lake sometime around 6:00 o'clock he had some $2000 in his possession (Vol.II T.30). While in the bus depot Mr. Parks accosted him indicating that he wanted to buy some cocaine. Haynes declined, an argument ensued, and he, Parks, and DeLucia went out the door of the bus depot (Vol.II T.32). Outside, adjacent to the front door of the depot, Parks indicated that if they did not give him the cocaine he would take it from them. Thereupon, according to Haynes, two men approached from the left at a rapid rate. One of the men pushed him and ordered him not to move, indicating that he had a gun. The man on the right pulled a short .22 rifle from under his coat and threatened Haynes with it. Haynes grabbed the barrel, a struggel ensued in which Parks involved himself, and as a result the gun fell to the ground (Vol.II T.33-38). During the struggle Haynes received an injury to his head. He

thought he had been shot, but it is more likely that he was struck. After the struggle Parks picked up the gun and ran across the street (Vol.II T.38) and both of the victims ran toward the rear of the terminal. The witness identified the assailants as appellant and Richard Ronald Nielson (Vol.II T.40). As the victims fled down the alley Haynes observed that Nielson was chasing them. Haynes went into the bus station through the garage area, concerned mainly about having his injury treated (Vol.II T.42). His testimony was absent any indication that anything was taken from him in the course of the incident.

John C. Davis, a Salt Lake City Police Officer, testified that he impounded a red Pantera registered to appellant in front of the Greyhound Bus depot on the evening in question (Vol.II T.94).

The State then called Richard DeLucia, the other vicim of the alleged robbery. DeLucia corroborated most of the events prior to the robbery itself, which he stated occurred between 8:00 and 8:30 p.m. (Vol. II T.98-103). His description of the robbery itself corroborated that of Mr. Haynes. Additionally, he testified that the two alleged robbers came from the direction of the Pantera. He corroborated Haynes' testimony that the gun wielding assailant was appellant Dumas. He stated that he did not hear a shot fired (Vol.II T.108). He said that during the scuffle he jumped on Nielson's back, and that after the scuffle he ran to the parking lot of the Salt Palace. He said that Niel-

son pursued him, caught him, and pushed him to the ground (Vol.II T.110). At this time a white Chevrolet automobile drove up containing two other individuals (neither of whom was appellant), one of whom got out of the car and bound and gagged him with white surgical tape (Vol.II T.110-111). Whereupon, he identified Nielson as the man who removed money from his person and kicked him in the eye (Vol.II T.112-114).

Kenneth Thirsk, a Salt Lake City narcotics officer, identified a quantity of money delivered to him by Haynes and a suitcase containing the drugs which Haynes and DeLucia had transported from New York, which were admitted into evidence.

Office John Foster, a Salt Lake City Policeman testified that he was the initial investigating officer of the alleged robbery. He stated that he talked to DeLucia who indicated that the only item taken from him had been a locker key (Vol.III T.24). DeLucia apparently related the details of the incident to him. He testified that subsequently on the same evening he saw the appellant Dumas in the custody of Officers Humphreys and Rackley who had returned Dumas to the bus depot. At the time seen by Officer Foster, the appellant was wearing a v-neck pull-over and a pendant around his neck (Vol.III T.28). He did not see whether or not he was wearing additional jewelry because he did not see his hands (Vol.III T.28). Officer Rackley testified that he had arrested appellant at the Salt Palace sometime after the robbery had occurred (Vol.III T.10).

John Johnson, a Salt Lake City Police Detective, admitted that the victims, when initially relating the details of the robbery to him, indicated that only one assailant approached and that they did not know which of the assailants had the gun (Vol.III T.44).

On behalf of defendant Nielson, several witnesses were called to testify that between 7:30 and 8:30 he was engaged in a conversation with one Cindy Jordan, and that subsequently, near 9:00 he was seen at Ceasar's Lounge in Murray (Vol.III T.67-89). On behalf of defendant Dumas, Roger Jones, the Salt Lake City jailer introduced a booking slip which indicated that when booked Mr. Dumas was in possession of a large quantity of turquoise jewelry (Vol.III T.98).

Teddy Klassen was recalled and testified that when he saw Mr. Dumas at the bus depot he was not wearing a trench coat (Vol.III T.103). He also testified that he saw a light gray Chevrolet automobile in the front of the bus depot at or about the time of the robbery.

Claude Parks was recalled and testified that there was no conversation concerning the robbery at the time he met Mr. Dumas in the parking lot at the Salt Palace in the company of Mr. Boone (Vol.III T.111); that at no time in the evening in question did he see Mr. Dumas wearing a trench coat (Vol.III T.116); and that Mr. Dumas and the other individuals with whom he had been seen in the lavatory of the bus depot were down the

street at the time the robbery incident occurred (Vol.III T.116). He reiterated the fact that only himself and Nielson were directly involved in accosting the victims (Vol.III T.127).

ARGUMENT

PREFATORY NOTE TO ARGUMENT

Three aspects of the State's presentation of this case cast a deep shadow over proper resolution of the factual issues raised. Because of the overriding nature and persistent effect of these factors, appellant urges the Court to bear them in mind as it reads and considers the individual issues presented by this appeal.

First, appellant was tried in a joint trial with co-defendant Richard Ronald Nielson, whose defenses were in such substantial conflict with those adduced by appellant as to substantially inpede appellant's right to defend the allegations of the Information and fairly rebut the evidence against him. See pp. 30 through 31, supra.

Second, the State introduced evidence against the defendant which was internally inconsistent, with the result that he was forced to defend what were essentially two separate crimes based on entirely separate acts. Haynes and DeLucia (pp. 5 and 6, supra) testified that appellant accosted them as a direct participant in an attempted robbery. Claude Aaron Parks testified that appellant had not directly participated in the robbery but had merely been present when comments were made about the

fact that the robbery was going to occur (p.3, supra).

Third, is the fact that the State in its argument to the jury (supported by the instructions by the Court) encouraged the jury to find appellant guilty under one of two separate theories of criminal culpability, to-wit: either as a direct participant, or as an "aider and abettor" as defined by the laws of the State of Utah.

I

THE EVIDENCE AS TO APPELLANT IS INSUFFICIENT TO SUSTAIN THE VERDICT

The thrust of the State's rather ambiguous allegations as to the conduct of appellant as it related to the robbery are summarized by the prosecutor at Vol.IV T.15.

> What about Mr. Dumas' participation in the crime? DeLucia and Haynes said he had the gun. Parks said he didn't. What difference does it make? The Court instructed you in the instruction ... with regard to principals. It is not just two guys going in to rob a bank. Now, the two guys go in to rob it and they have a third man driving a get away car. They go in and take the property by means of force and fear. They are not the only ones going to be responsible. Also responsible is the man outside, although, as a factual matter, he didn't go and take the funds by force and fear. You are talking about "principal". It is not the person that directly commits the offense. Anyone who aids, intentionally aids, encourages, solicites, commands .. read the instruction. The commission of that offense, not everyone in this offense got involved in the struggle. Whether it was Mr. Nielson or Mr. Dumas, that is for you to decide which one. What difference does it make who had the gun? They were both there, responsible for each others conduct. Give that some thought. Was Mr. Dumas involved or wasn't he?

Appellant finds fault with two aspects of this argument. The first one is that "involvement" is not necessarily a crime. The second is that it does make a substantial difference who had the gun and who directly participated in the robbery in light of the fact that if direct participation was not performed by Dumas, some act must be shown to have been committed by him which was integrally related to the substance of the offense.

The State did not directly contend that Dumas actually had the weapon or actually accosted the victims despite the fact that two of its star witnesses so testified. Thus, attention is now directed to the alternative theory of guilt asserted against Mr. Dumas which was that he was a "aider and abettor" of other principals in the offense.

Controlling Utah authority on the meaning of "aiding and abetting" is found in State v. Laub, 102 U.402, 131 P.2d 805 and State v. Johnson, 6 U.2d 29, 305 P.2d 488. An examination of these opinions is instructive in light of the facts of this case.

In Laub, supra, four individuals were present on a cattle range. Witnesses saw three of the men merging from the woods covered with blood. The fourth man was standing near a vehicle. It was demonstrated that a calf had been recently slaughtered in the same area, and that one or more of the four defendants had been in possession of a beef carcass. There was evidence that certain of the individuals made inconsistent ex-

planations to witnesses of the circumstances of the case. The Court held that circumstantial evidence against three of the four defendants was sufficient to justify conviction. In reversing the conviction of the fourth defendant the Court said:

> Cannon however, is in a different position. He was not with the other three defendants when they came from the woods. He did not have any blood on him, nor did he stay with the other defendants so that the court or jury could infer that he helped bring the carcass to the truck. The uncontradicted evidence is that he went with the Trumans to help them load their wood and did not rejoin the other defendants until they were ready to leave for home. The only evidence which points to his guilt is that he made false statements about trading pine nuts for the meat in Nevada and he took part of the meat. This is not sufficient evidence to uphold his conviction. This is not a charge of conspiracy and there is no evidence that he in any way aided in or planned the commission of the crime.

In Johnson, supra, defendant was observed looking in a store window when his companion was inside committing a burglary. He was then seen walking rapidly towards the rear of the building. There was evidence that defendant hid a ladder which his companion had used to gain entrance and was acting as a look-out for the companion. This court concluded that from the evidence and the reasonable inferences therefrom a jury was justified in finding beyond a reasonable doubt that appellant was guilty of aiding and abetting his confederate in the burglary. In so holding, the court specifically relied upon the presence of direct affirmative evidence that defendant had performed acts which materially aided the confederate to commit the burglary, particularly in

hiding the ladder which was used by the confederate in gaining entry to the store, and the inference that he was acting as a look-out.

The concensus of these Utah cases is that the State must show evidence of affirmative verbal or physical conduct integrally related to the direct commission of the offense in order to sustain a conviction for "aiding and abetting." Such a consensus would be consistent with the holdings of the Supreme Court of the United States and those of most of the Courts of Appeals related to this issue. The Supreme Court has indicated that one must consciously share in the criminal act in order to be a principal, whether an aider or abettor, or otherwise. Pereira v. U.S., 347 U.S. 1, 98 L.Ed. 435, 74 S.Ct. 358; and further that one is an accomplice "if with purpose of promoting or facilitating the crime, he ... substantially facilitates its commission," Scales v. U.S., 367 U.S. 203, 6 L.Ed.2d 782, 81 S.Ct. 1469, rehearing den., 360 U.S. 978, 6 L.Ed.2d 1267, 81 S.Ct. 1912. The Second Circuit has held that the mere fact that one is in the company of another who commits a crime is not sufficient to establish aiding and abetting. U.S. v. Garguilo, 312 F.2d 249 (2d Cir. 1962). In that case the Circuit additionally held that knowledge that a crime is being committed even when coupled with presence of the scene is generally not enough to constitute aiding and abetting. The Tenth Circuit has held that active assistance is required to justify a conviction for aiding and abetting.

White v. U.S., 366 F.2d 474 (10th Cir. 1966); and additionally held that mere presence at the scene is not sufficient, King v. U.S., 402 F.2d 289 (10th Cir. 1968). The driving of a get away car has consistently been held to be sufficient, see e.g. U.S. v. Young, 468 F.2d 595 (5th Cir. 1972), cert. denied 414 U.S. 849, 38 L.Ed.2d 97, 94 S.Ct. 139, as has active participation as a look-out. See e.g. Johnson, supra.

A plethora of cases hold that a mere presence at the scene of a crime is insufficient to justify a conviction for aiding and abetting. Snyder v. U.S., 448 F.2d 716 (C.A. N.D. 1971); U.S. v. Joiner, 429 F.2d 489 (5th Cir. 1970); U.S. v. Holt, 427 F.2d 1114 (C.A. Mo. 1970). In dictum the United States Supreme Court has held that "aiding and abetting means to assist the perpetrator of the crime (citing Hitch v. United States, 150 U.S. 442, 14 S.Ct. 144, 37 L.Ed. 1137 and United States v. DiRe, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210) for the proposition that presence at the scene of a crime is not evidence of guilt as an aider and abettor". U.S. v. Williams, 341 U.S. 58, 95 L.Ed.747, 71 S.Ct.595. Perhaps the best synthesis of all of this is found in Long v. U.S., 360 F.2d 829 (1966) in which the District of Columbia's Circuit stated that mere presence at the scene is enough only if it is "intended to and does aid the primary actors". Similarly, see U.S. v. Moses, 122 F.Supp. 523 (D.C. Penn. 1954) in which the Pennsylvania United States District Court held that "aiding and abetting" implies and requires some conduct of an

affirmative nature, and mere negative acquiesence is not sufficient.

Of similar import is the instruction given to the jury in this case which is consistent with Sec. 76-2-202; obviously given in contemplation of the possibility that the jury may not have believed that appellant directly participated in the robbery:

> Criminal responsibility for direct commission of offense or for conduct of another. - Every person, acting with a mental state required for the commission of an offense who directly commits the offense, who solicites, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

This statutes is consistent with the case law in requiring direct and affirmative verbal or physical conduct as a precondition to convicition. Two aspects of the statute require physical acts, to-wit: those who directly commit a crime or "aid" another to engage in conduct which constitute and offense. The balance of the section relates to verbal conduct which can make one liable as a party for the commission of crime. Inasmuch as there was no allegation of verbal conduct of the sort described in Sec. 76-2-202, no further consideration thereof is required in this case. An examination of the conduct of the appellant in light of the language of the statute and the case holdings under which it must be construed demonstrate that his conviction as an "aider and abettor" cannot be upheld.

The State relies on the following facts to demonstrate that Dumas was an "principal in this offense", excluding its

contradictory allegations that he directly involved himself in the robbery.

1. His Pantera automobile was outside the bus depot with Mr. Parks' coat in it (Vol.IV T.6).

2. Parks saw Dumas in the parking lot of the Salt Palace in the company of Gale Boone, at which time no conversation concerning a robbery occurred (Vol.IV T.6).

3. Dumas was present in front of the bus depot standing some distance away when the robbery occurred (according to Mr. Parks)(Vol.IV T.11).

4. Dumas left his car sitting in front of the bus depot after the robbery with the keys in it (Vol.IV T.16).

5. Mr. Dumas' presence in the bathroom of the bus depot during a period of time when the robbery was being discussed (Vol.IV T.65), coupled with the fact that Mr. Dumas did not disavow any of that conversation according to the evidence.

6. The State then alleged that Dumas had "planned the robbery" (Vol.IV T.66). There was no direct evidence of this whatsoever.

All of the foregoing is circumstantial. It does show that appellant was present when the robbery occurred and there is an indication that he may have known that it was going to occur. Nonetheless, the cases hold that those two facts, even when coupled together, are insufficient to constitute proof beyond a reasonable doubt. The absence of any evidence of an act integrally related to or required to faciliate the robbery is absent. Failing such proof, the State asked the jury to speculate that Mr. Dumas participated in planning the robbery which, under the cases would make him an aider and abettor if

his actions constituted active encouragement (Vol.IV T.65). Nonetheless, Mr. Parks, the only witness to the conversations which led up to the robbery, testified that Mr. Dumas did not participate in planning the robbery, and that at best he may have made one statement in the lavatory of the bus depot. Since Mr. Parks was not sure who had made the statement it cannot constitute proof beyond a reasonable doubt of appellant's complicity.

The sum of the legitimate inferences from the circumstantial evidence is not so conclusive as to preclude hypotheses or explanations inconsistent with his innocence. The evidence in this case is more like the evidence in the Laub case against the defendant whose conviction was reversed than it is similar to that against the defendant in the Johnson case. The State must prove a criminal act to sustain a conviction, State v. Bassett, 27 U.2d 272, 495 P.2d 318 (1972). Here, there was no evidence of aiding and abetting by direct or indirect participation. The best the State could even contend would be a very obtuse inference that Dumas was a look-out for the robbery; made insufficient by Parks' testimony which does not even suffice to show that Dumas was there during the entire course of the criminal performance. The evidence of "aiding and abetting" is totally insufficient, and to sustain his conviction based thereon is to render the "beyond a reasonable doubt" standard a sham and to deny due process in contravention of the law of the State of Utah.

II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GIVE APPELLANT'S PROPOSED JURY INSTRUCTION NO. 2

At trial appellant requested the Court to give the following jury instruction, designated Defendant's Proposed Jury Instruction No. 2.

> To warrant you in convicting the defendant the evidence must, to your minds, exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if after an entire consideration of and comparison of all the testimony in the case, you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you must acquit him.

The Court refused to give this instruction which embodies what is known as "Hodge's Rule" on the ground that such instructions are required only in cases where all of the evidence of defendant's guilt is circumstantial. Proper exception to the Court's failure to give this instruction was made by the defense at Vol.IV T.71.

The Court's statement of the law is correct, that is; the "reasonable hypothesis" instruction is applicable only to circumstantial cases. See e.g. State v. Garcia, 11 U.2d 67, 355 P.2d 57 (1960), wherein this court said:

> ... it is universally recognized that there is no jury question without substantial evidence indicating defendant's guilt beyond a reasonable doubt. This requires evidence from which the jury could reasonably find defendant guilty of all material issues of fact beyond a reasonable doubt. In applying this rule, usually

> with reference to the jury instructions, we have held that where the only proof of material fact or one which is a necessary element of defendant's guilt consisted of circumstantial evidence, such circumstances must reasonably preclude every reasonable hypothesis of defendant's innocence. (Quoting State v. Irwin, 101 U.365, 120 P.2d 285 (1941); State v. Burch, 100 U.414, 115 P.2d 911 (1941); State v. Laub, 102 U.402, 131 P.2d 805 (1942); State v. Anderson, 108 U.130, 158 P.2d 127, 159 ALR 340(1945); State v. Crawford, 59 U.39, 201 P.130 (1921); People v. Scott, 10 U.217, 37 P.335 (1894)).

The trial Court's error in this case was not one of law, but one of application of that law to the facts of the case.

Evidence was adduced by the State from which the jury could conceivably have found defendant guilty on two separate theories: first, that he accosted the victims, drew a weapon, assaulted one of the victims, and attempted to rob him; and second, that he was guilty by reason of his having been present when the robbery was planned and executed, from which an inference could have been drawn that he was an aider and abettor by planning or encouragement or that he acted as a look-out. As to the first theory, all of the evidence was direct, and thus the Hodge's Rule instruction would be inappropriate. As to the second theory however, all of the evidence was circumstantial, consisting solely on the facts set forth at p. 16 supra. The jury verdict in this case did not require specification of the theory upon which guilt was found. We have no way of knowing the particular facts upon which the jury relied to find defendant's guilt.

In such circumstances the general rule is as follows:

> In order to sustain a general verdict of guilty where the case has been submitted to the jury under two distinct theories as to the guilt of the accused, the evidence must be sufficient to sustain a conviction upon either. 30 Am.Jur.2d "Evidence", Sec. 1124, Vol. 30 p.292, citing People v. Sullivan, 173 N.Y. 122, 65 N.E.989.

As indicated above, the evidence that appellant was guilty as an aider and abettor is insufficient to sustain the verdict. Further more, the failure to give the Hodge's Rule instruction requested by defendant as to the aiding and abetting theory of the case poses a substantial likelihood that the jury found his guilt on that theory not only with insufficient evidence, but without the benefit of a proper instruction.

A similar circumstance was faced by this Court in State v. Pacheco, 27 U.2d 45, 492 P.2d 1347 (1972). There defendant was charged, apparently by a short form Information, with the crime of grand larceny of a rifle. Though there was circumstantial evidence that Pacheco himself may have perpetrated the burglary, there was also evidence that he may have acted as an aider and abettor of his brother. After the latter evidence was in, the trial court, over objection, gratuitously instructed the jury on the theory of aiding and abetting. In reversing the conviction this Court said at 492 P.2d 1348.

> This man is entitled to a new trial since it is impossible for this court to prestidigitate whether the jury convicted the defendant of larceny or aiding and abetting, under the record

> in this case. We cannot enjoy the luxury or humiliation in this county to sustain the conviction of a man on trite aphorism unsupported by any kind of evidence.
>
> The dissent says that there is no such crime as aiding and abetting. Not so. To convict for aiding and abetting, under Title 76-1-44, U.C.A. 1953 the State must prove first that some other person, - in this case appellant's brother, Bob - committed the offense. No effort was made by the State so to do, and so far as this record is concerned Bob or anyone else has never been charged with the offense. ...

Though the facts presented by the Pacheco case are not in point, the legal theory is, and should be applied to this case. Appellant Dumas, by motion for bill of particulars, requested the State to set forth the acts upon which it intended to rely in proving his guilt. The trial court refused to require the State to disclose these facts. It was this action by the trial court that made it unnecessary for the State to elect the theory upon which it would proceed prior to trial, and which permitted it to introduce entirely contradictory evidence related to the defendant. Here, as in Pacheco, it is impossible to determine which theory it was upon which the jury convicted. In Pacheco the difficulty was that they had failed to prove that someone else had performed the burglary which was viewed by this court to be a precondition to an aiding and abetting conviction against Pacheco. In this case, the State proved no act or conduct of the defendant which could have constituted aiding and abetting. Both failures are fatal to the convictions. The legal posture of these cases is

identical. Due process has been violated with the result that this Court should under its holding in Pacheco, supra, grant appellant a new trial at which the State should be required to make an election as to how it wishes to proceed. If it proceeds on a theory of aiding and abetting, the "reasonable alternative hypothesis" instruction should be required.

III

PREJUDICIAL ERROR WAS COMMITTED BY THE TRIAL COURT IN REFUSING TO GRANT APPELLANT A SEPARATE TRIAL

Appellant was charged by Information, Case No. 27644, filed March 27, 1975. Co-defendant Richard Ronald Nielson was charged by similar Information, also bearing Case No. 27644, filed March 13th, 1975. Though arraigned separately, these two cases were set for trial upon the same day. Defendant Nielson filed a motion, joined by appellant Dumas, seeking severance of the two cases for trial. Appellant resisted the joinder of the two cases and sought severance on the ground, inter alia that there was no statutory provision for joint trial of separately filed criminal cases. The objection to joinder and the motion to sever were overruled and denied, respectively, and the cases were tried together.

The rulings of the trial court both in joining the two cases for trial and refusing to sever them upon motion of defendants were in contravention of the statutes of the State of Utah

and denied appellant due process.

First is the fact there is no provision permitting joint trial of criminal defendants except Section 77-31-6 which provides:

> When two or more defendants are jointly charged with any offense, whether felony or misdemeanor, they shall be tried jointly unless the court in its discretion on motion of the prosecuting attorney or any defendant orders separate trials. ...

There is no statutory definition of the term "jointly charged"; but the phrase must be given its common meaning (77-21-26, U.C.A. 1953, as amended). Since multiple defendants can be charged jointly under a single Information, "jointly charged" must refer to that type of multiple-defendant Information. In this case, the County Attorney elected to file separate Informations on separate dates; hence, these individuals were not jointly charged. Therefore, Section 77-31-6, U.C.A. 1953, as amended, the only Utah provision permitting joint trial of two or more defendants, cannot be invoked, with the result that the act of the arraigning judge in setting these two cases for joint trial was erroneous and in contravention of law.

Notwithstanding the foregoing error, the matter was exascerbated by the trial court's failure to sever. Severance in Utah is vested squarely within the discretion of the trial judge, and who will not be reversed for failure to sever except where he has abused his discretion. State v. Lybert, 30 U.2d 180, 515 P.2d 41 (1973). The question raised is "what is an abuse of discretion". The controlling case on that issue is

State v. Rivenburgh, 11 U.2d 95, 355 P.2d 689 wherein the court set forth this rule:

> When two or more defendants are jointly charged with any offense they shall be tried jointly, unless the court in its discretion orders separate trials. If the ruling of the court deprives the defendant of a fair trial, then the trial has abused its discretion. The discretion may not be exercised arbitrarily (emphasis added).

Since this rule uses the legal conclusion "fair trial" to define the legal conclusion "abuse of discretion," analysis of the facts of each case is necessary to determine whether it has been properly applied by the trial court. Though they are stated in the negative, the Rivenburgh case goes on to cite such factors as "inconsistent or antagonistic defenses, and hostility ... between the co-defendants, with each protesting his innocence in condeming the other"; cooperation between the jointly tried defendant's counsel; and propriety of instructions related to evidence admissible against one defendant but not the other as factors to be weighed in determining whether failure to sever has deprived due process in any given case. An analysis of these factors will demonstrate that the trial court abused its discretion in refusing to order severance in this case.

Here, the State adduced evidence that both George Dumas (out of the mouths of Haynes and DeLucia) and Richard Ronald Nielson (out of the mouth of Claude Aaron Parks) had accosted Haynes and DeLucia and attempted to rob them by use of a firearm.

All the witnesses were, however, consistent in stating that only one individual held a weapon. As a result, the only way that Nielson (against whom no evidence was introduced related to his having participated in any other way) could defend himself was to support the testimony of those who said that George Dumas was the active assailent in the robbery. On the other hand, Dumas, in order to defend himself, had no alternative but to support the testimony indicating that Nielson had held the weapon as the first leg of his defense against having been both a direct participant and an aider and abettor. The net result was that the State after having adduced directly conflicting evidence, had nothing to do but sit back and watch the defendants distroy each other. The argument of the undersigned to the jury demonstrates a distinct effort to convince the jury that Parks was telling the truth. Alternatively, the argument of counsel for Nielson at Vol.IV T.25-37 constitutes a valiant effort to demonstrate that Parks was lying and that Dumas had the gun. This is not the kind of "different defense" not found to be "inconsisten[t]" and "antagonis[tic]" in Rivenburgh, supra. The defenses of appellant and Nielson were a direct and absolute conflict. Each of the defendants could be acquitted only if he succeeded in convicting the other. This antagonism was so clear that it made it unnecessary for the State to either "fish or cut bait" in its argument to the jury as to which defendant had performed which acts. As a result of this inconsistency the

State was permitted to merely lay back and let the jury fen for itself, secure in the knowledge that the trial would result in at least one conviction because of the defendants' need to destroy each other. If our statute and constitutional guarantee of due process do not demand severance in this case they are for naught. The trial court's refusal to sever warrants a new trial.

IV

DUE PROCESS WAS DENIED BY THE TRIAL COURT'S LIMITATION OF DEFENDANT'S EFFORT TO REABILITATE THE TESTIMONY OF CLAUDE AARON PARKS

The State of Utah moved the Court to dismiss the charge of robbery against Claude Aaron Parks and to grant him immunity from prosecution for any acts committed by him in connection with the robbery (Vol.I T.11). The Court granted both motions (Vol.I T.13), ruling that the matter would not placed in front of the jury unless done so by the defense (Vol I. T.14). Counsel for co-defendant Nielson, on the cross-examination of Mr. Parks, made a significant point of calling the attention of the jury to the fact that Parks had asked for immunity in the case because he was concerned that if not granted immunity he would be convicted of robbery (Vol.I T.47). The purpose of counsel's questioning is made obvious in his summation where he strongly implies that this grant of immunity was sufficient motive for Parks to have lied about the involvement of Richard Ronald Nielson in the robbery (Vol. IV T.24, 25 and 29). This argument was designed to strengthen

the testimony of Haynes and DeLucia that appellant, not Nielson, had accosted them with a gun.

Argument of this ilk has been recognized, approved and facilitated by the United States Supreme Court in Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972) which contains the following language:

> Here the government's case depended almost entirely on Talaiento's testimony; without it there would have been no indictment and no evidence to carry the case to the jury. Talaiento's credibility as a witness was therefore an important issue of the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it (citing Napue v. Illinois, 360 U.S. 264) [emphasis added].

Though the instant case does not contain the element of suppression upon which Giglio is based, the square holding of the Supreme Court that plea or dismissal information must be disclosed to the jury to insure proper evaluation of the credibility of the State's witnesses undoubtedly affected the verdict in this case by forcing disclosure of Parks' dismissal by co-defendant's counsel. The Supreme Court has, since Giglio, had another occasion to treat this issue in DeMarco v. United States, 415 U.S. 449, 39 L.Ed.2d 501, 94 S.Ct. 1185, in which it remanded to the District Court for an evidentiary hearing to determine whether the government had promised leniency to a co-defendant witness before he testified that no promise had been made to him with respect to the disposition of his case.

The Supreme Court, Renquist, Burger and Powell dissenting on purely procedural grounds, remanded the case; restating the holding of Giglio that if the promise had preceeded the witness' testimony a new trial was warranted. The Supreme Court as presently constituted seems to be squarely behind the Giglio decision. Circuit Courts of Appeal have uniformly applied the holding of Giglio under the Fourteenth Amendment due process clause, see e.g. Armour v. Salisbury, 492 F.2d 1932 (6th Cir. 1974) where an Ohio prosecutor deliberately mislead the jury with a summation statement that a key prosecution witness had nothing to gain by testifying, when the witness knew that his "chances" for an early probation hinged on his testifying against defendant at trial. There, as here, the witness' expectations were deemed critical.

In U.S. v. Tashman, 478 F.2d 129 (5th Cir. 1973) appellant's co-defendant had negotiated a plea and received a sentence of two years probation without those facts having been disclosed to appellant. The Fifth Circuit reversed using the following language:

> The action of counsel for Osbrach and the government acquiesced in by the court was so prejudicial as to require a new trial. Being unaware of what occurred behind the closed doors of the courtroom, appellant had no way of combatting the damaging testimony elicited by the government from Osbrach. Faced with an apparently hostile witness, defendant's counsel elected to forego examination of Osbrach. Under the circumstances the jury had no way of knowing what interest Osbrach had in testifying. We

> need not speculate on what effect knowledge of the secrete contingent agreement would have had on the jury. The Supreme Court has made it clear that the failure of the government to disclose to the jury a plea bargaining negotiation by a key witness deprives the defendant of constitutional due process [emphasis added].

Of further instruction is Berkholder v. State, 493 S.W. 2d 217 (Tex.C.A. 1973) where, in a murder trial an agreement had been reached with co-defendant's lawyer that if he would testify against defendant without demanding immunity he would not be prosecuted (a transparent effort to evade Giglio). The lawyer told his client only that if he testified it would "help him." The Texas court held:

> One reasonable inference to be drawn from the Whitehurst's actions (in denying knowledge of the deal in a qualified way) is that he knew of the State's plan to not prosecute, but also knew not to mention it for failure of jeopardizing the entire scheme. Whether or not this is true is not for us to decide. The point is that the jury should have been given an opportunity to judge Whitehurst's credibility for themselves. The trial court's refusal to require the disclosure of the State's plan not to prosecute Whitehurst deprived the jury of that function.

In the instant case counsel for Nielson properly invoked Giglio and effected disclosure of Parks' dismissal to the jury, making considerable hay of it in argument. This was proper. The error here was that the jury was never informed that Parks was a federal parolee from Leavenworth Penitentiary and that by admitting his complicity in the robbery on the witness stand he was admitting a parol violation fully expecting that the

result would be his prompt return to prison. The efforts of appellant's counsel to inform the jury of these facts resulted in the following (Vol.III T.117-119):

> Q. [By Mr. Barber] Now, Mr. Parks there has been evidence adduced in this trial on stipulation that you received a grant of immunity in exchange for your testimony, correct?
>
> A. [By Mr. Parks] Yes.
>
> Q. And you understand by that, that you won't be prosecuted by the State of Utah?
>
> A. Yes.
>
> Q. Despite that, do you have an opinion about whether your having given the testimony you have given at this trial will result in your imprisonment?
>
> A. Do I have an opinion?
>
> Q. Yes.
>
> MR. KELLER: Well, Your Honor, I object to that. I just don't understand. For one thing, if we are going to talk about opinions, we need foundations. Mr. Parks has already testified that he got immunity. We stipulated to that. I am not sure what Mr. Barber is trying to gain by a question like that.
>
> THE COURT: Sustain the objection.
>
> Q. (By Mr. Barber) Well, State immunity, Mr. Parks, results in your just being able to walk away from this affair and not be returned to prison?
>
> MR. KELLER: Same objection.
>
> THE COURT: Sustained.
>
> MR. BARBER: Your Honor, I think this is proper under Giglio.

THE COURT: No.

MR BARBER: The facts about his expectation as a result of his testimony are clearly relevant. There has been testimony going one way and I think I am entitled to testify going the other way.

THE COURT: I sustained the objection. If he has any knowledge, you can ask him, but I am not going to permit speculative questions in that area.

Q. (By Mr. Barber) Do you know, Mr. Parks, whether any other legal action will be taken?

A. No, I don't know.

Q. You don't. All right, that is all I have.

If disclosure of a governmental proffer of immunity to a witness is deemed by the United States Supreme Court to be critical to due process presumably because of its power to tempt false testimony for personal gain, how can it be said that information that the state proffer will not forestall the disaster of a prison sentence likely to be imposed as a direct result of the witness' testimony be said to be any less critical to due process? How can a jury fairly assess a witness' "probable motive or lack thereof to testify [as he has]" absent knowledge that the substantial motive to lie shown at trial really amounts to nothing to the witness? It cannot: for our jury system has validity as a fact-finding institution only so long as we carefully guard its right to all information reasonably relevant to a fair resolution of the facts. Whatever finding of fact the

jury in this case made about who wielded the weapon on Feburary 19, 1975 is invalid because made without teh benefit of relevant information of overwhelming importance. All appellant asks is for a new trial at which the jury is given a fair "opportunity to judge [Parks'] credibility for themselves." The Supreme Court of the United States has said that due process demands as much and this Court should secure that guarantee to the citizens of Utah.

V

THE INFORMATION SHOULD HAVE BEEN QUASHED FOR FAILURE OF THE STATE TO PROVIDE A SUFFICIENT BILL OF PARTICULARS AND FOR PROSECUTORIAL MISCONDUCT RELATED TO DISCOVERY WHICH DENIED DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL

A. On April 9th, 1975 appellant filed a Motion for Bill of Particulars requesting the court to order the State to disclose "the particular acts allegedly performed by George O. Dumas which constitute the crime of robbery as charged." This motion, together with a similar motion filed by co-defendant Nielson was denied on May 5th, 1975. The denial of the motion for these particulars was reversible error.

Section 77-21-9, Utah Code Annot. 1953, as amended, provides that if the Information "fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense, or to give him such information as he is entitled to under the Constitution of [Utah]" he is entitled to

a Bill of Particulars containing "such information as may be necessary for these purposes." The governing constitutional principle is found in Article I Section 12 of the Constitution of Utah which provides that "the accused shall have the right to ... demand the nature and cause of the accusation against him ...". It is obvious that the "cause" of an accusation against an individual is normally his performance of some act which constitutes a crime.

This Court has given us some guidance as to the information to which criminal defendants are entitled. In State v. Robbins, 101 U. 119, 127 P.2d 1042, defendant appealed a robbery conviction on the grounds that the Information filed against him was inadequate to charge the offense of robbery because it did not specify that the theft had been accomplished by force or fear. In sustaining appellant's conviction the court said:

> No question could have been in the mind of Robbins as to the nature and cause of the accusation against him. But if he were in doubt the law provides that he may demand the nature and cause of the action against him. The alleged fact or facts which the State proposes to prove may be secured by demanding a Bill of Particulars (127 P.2d at 104) [emphasis added].

In State v. Soloman, 93 U. 70, 71 P.2d 104 (1938) the court indicated that "the granting of a Bill of Particulars" is not discretionary with the court as it was at common law, but is a right which the defendant can demand and which the court must grant if the statutory conditions are met.

Because of the manifested tendencies of defense counsel to abuse the right to a Bill of Particulars and to seek by that means to obtain a preview of the State's evidence against their clients, this court has clearly said that matters of mere evidence are not discoverable by way of a Bill of Particulars. In State v. Lack, 221 P.2d 852 (1950) the defendant was charged with embezzlement from a State liquor store. He sought, by Bill of Particulars, to obtain copies of invoices, delivery sheets, ledger sheets, vendor reports, and other matters which this court characterized as "evidentiary". In sustaining the trial court's refusal to order these matters disclosed by Bills of Particulars, the court said:

> ..."The Bill of Particulars need not plead matters of evidence." Section 105-21-9(1) U.C.A. 1943 was designed to enable a defendant to have stated the particulars of the charge which he must meet, where the short form indictment or information is used. It was not intended as a device to compel the prosecution to give an accused person a preview of the evidence on which the state relies to sustain the charge.

Recent pronouncements of this Court have done nothing to alter these early guidelines. State v. Moraine , 25 U.2d 51, 475 P.2d 831 merely holds that a statement of a witness used against the defendant is the kind of "evidentiary" material which need not be provided by the Bill of Particulars. Similarly, State v. Lauder, 25 U.2d 418, 483 P.2d 887 holds that failure to require disclosure of a statement by a witness which was never used at trial, and of which defendant was already aware was not reversible error.

Furthermore, the court found that the defendants in both of these cases had waived their right to the Bill by either failing to object to the challenged testimony or to ask for a continuance in order to prepare the case for defense where defendant felt that the Bills provided was inadequate.

There remains then only one question: Are the "particular acts performed by [defendant] which constitute the crime of robbery" evidentiary facts or the "particulars of the offense"? Appellant contends that the answer is obvious. All the language of the Motion for Bill of Particulars asks for is a description of the acts allegedly performed which constitute the crime of robbery. It does not ask for disclosure of the means or methods by which State intends to prove that appellant performed those acts. It does not, like the Bills discussed in Meringue and Lauder, ask for disclosure of statements of witnesses; neither does it ask for the disclosure of documentary or any other kind of evidence as did the motion in Lack. This motion asked for precisely what this Court has said defendants are entitled to in Robbins. Section 76-2-202, U.C.A. 1953, as amended, can make one a principal in a criminal endeavor for all sorts of different conduct. In this case, the State urged the jury to convict on two theories, each supported by altogether different proofs. Without knowing that the State intended to proceed on a contradictory basis, appellant's ability to properly defend this case was substantially impaired. Thus, the failure of the trial court

to order the particulars demanded was reversible error.

B. On May 5th, 1975 defendant Nielson asked, by Motion for Bill of Particulars for a list of the witnesses to be called at trial. Appellant did not file an independent motion for this information because of his knowledge that once the material had been disclosed to defendant Nielson he would have equal access to the information. Thus he merely joined in Nielson's motion for disclosure of the names of witnesses. On May 5th, 1975 the Honorable Bryant Croft ordered the State of Utah to provide defendants with the names and addresses of all witnesses to be called at trial. This Order is reflected by marginal notations on the Motion for Bill of Particulars filed by Nielson. On May 30th, 1975 the office of the Salt Lake County Attorney filed a list of witnesses to be called at trial which showed the address of Robert Allen Haynes and Richard DeLucia, the State's chief witnesses in the case, to be "c/o J.L. Johnson, SLPD". It is manifest that J.L.Johnson is not the address of Robert Allen Haynes and Richard DeLucia, both of whom are residents of the City of New York. On June 9th, 1975 appellant filed a Motion to Quash based on the failure of the State to file an adequate Bill of Particulars as it related to the names and addresses of witnesses. That Motion contains a long and tortured recitation of the efforts of appellant's counsel to contact and interview two of the three eye witnesses to the offense prior to trial. The best that could be done was a brief telephone conversation on the day preceding

trial which left insufficient time to verify or check out the information given by the witnesses in that interview.

The courts are becoming increasingly sensitive to defendants need for access to witnesses and evidence prior to trial in order to secure proper defense. This awareness has been supported by the Supreme Court of the United States in such decisions as Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963). The legal profession has also recognized this defense need and has manifest its position in the ABA Standards related to the administration of criminal justice. Section 3.11 thereof states:

> DISCLOSURE OF EVIDENCE BY THE PROSECUTOR
> (a) It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity.
> (b) The prosecutor should comply in good faith with the discovery procedures under applicable law.
> (c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he believes it will damage the prosecution's case or the accused.

In a redundant citation to this Court of what the law is in some jurisdictions and what it ought to be in all jurisdictions, attention is again called to State v. Gregory, 369 F.2d 185 (D.C. Cir. 1966). There, defendant was charged with a capital offense. The federal statute required that a list of names of witnesses be furnished to defendant no later than two days prior to trial.

The prosecutor apparently provided the names and addresses of the witnesses, and though he did not instruct them not to talk to defense counsel, he did advise them not to talk to anyone unless he was present. The witnesses refused to be interviewed by defense counsel. In reversing the appellant's conviction the D.C. Circuit Court held:

> ... Witnesses, particularly eye witnesses to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity to interview them. Here the defendant was denied that opportunity which, not only the statute, but elemental fairness and due process required that he have ...
>
> A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial. A related development in the criminal law is the requirement of the prosecution not frustrate the defense in the preparation of its case. Information favorable to the defense must be made available to the defense (citing Brady). Reversal of convictions for suppression of such evidence, and even for mere failure to disclose, have become common place. It is not suggested here that there was any direct suppression of evidence. But there was unquestionably a suppression of means by which the defense could obtain evidence. The defendant could not know what the eye witness to the events in suit would testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview. In our judgment the prosecutor's advice to those eye witnesses frustrated that effort and denied appellant a fair trial [emphasis added].

Just as in Gregory, the Salt Lake County Attorney in this case "frustrated" defendant's effort to interview two critical witnesses prior to trial. That frustration substantially penalized appellant's efforts to probe the testimony of those eye witnesses that appellant held the weapon during the robbery and to explore the possibility that their statements to that effect were in error and that the contrary testimony of Parks was more accurate. The list of witnesses supplied by the State is far from a "good faith" effort to comply with a lawful order of the trial court. The prosecutor's action denied and frustrated due process.

Question: Why is it that prosecutors in this State persist in frustrating defense efforts at discovery at the expense of speed and dispatch in trials of criminal causes themselves and ofttimes at the expense of fundamental fairness?

Answer: This Court does not require them to do otherwise.

Appellant urges this Court to adopt the rule of Gregory and to direct prosecutors to comply with the ABA Standards related to the administration of criminal justice as they apply to the disclosure of evidence; and to do so by reversing this case and remanding it for new trial.

CONCLUSION

For the reasons stated, appellant prays this Court to enter its Order reversing its conviction and either quashing

the information against him or remanding the case to the District Court for new trial.

Respectfully submitted,

JAMES N. BARBER
MEREDITH, BARBER & DAY
455 South Third East, Suite 101
Salt Lake City, Utah 84111
Telephone: 521-2552
Attorney for Defendant-Appellant

DELIVERY CERTIFICATE

I hereby certify that I delivered two copies of the foregoing to the Attorney General of Utah, State Capital Building, Salt Lake City, Utah, this 19th day of May, 1976.